SUPPLEMENTAL BRIEF

No. 83-1919 (9)

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

THE CITY OF OKLAHOMA CITY,

Petitioner,

v.

ROSE MARIE TUTTLE,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

MOTION FOR LEAVE TO FILE SUPPLEMENTAL BRIEF AND SUPPLEMENTAL BRIEF FOR RESPONDENT

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THE CITY OF OKLAHOMA CITY,

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ROSE MARIE TUTTLE,

Respondent.

On Writ of Certiorari
to the United States Court of Appeals
for the Tenth Circuit

MOTION FOR LEAVE TO FILE SUPPLEMENTAL BRIEF

Respondent hereby moves this Court, pursuant to Rule 35.6, for leave to submit the annexed brief, and in support thereof states as follows:

At the oral argument in this action a dispute arose as to whether the petitioner had objected to the jury instructions in the manner required by Rule 51. In response to questions from the Court, counsel for petitiner did not assert that the statements of counsel contained in the trial transcript met the requirements of Rule 51. Rather, he asserted that a specific and sufficient objection had earlier been made off the record at an instruction conference with the trial judge.

This representation had never heretofore been made by counsel for petitioner in either this Court or the lower courts. The accuracy of that representation is critical to, if not dispositive of, this appeal, since without a sufficient objection this Court would lack authority to consider the correctness of the instruction at issue.

Respondent has lodged with the Court an affidavit of respondent's trial counsel regarding the off the record conference referred to by counsel for petitioner, and seeks leave to submit this brief setting forth her views on this new procedural problem.

Respectfully submitted,

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SUPPLEMENTAL BRIEF FOR RESPONDENT

In our principal brief we noted that counsel for petitioner had failed to make, with regard to the instruction regarding the evidentiary significance of a single constitutional violation, an objection

which satisfied the requirements of clarity and specificity established by Rule 51. (R. Br. 44-45, 45 n.62). Petitioner did not file a reply brief. When this matter arose at oral argument, counsel for petitioner did not contend that what was said on the record at trial was sufficient under Rule 51. (See Tr. 693). Rather, counsel for petitioner asserted that a legally sufficient objection had been made off the record at an earlier instruction conference with the trial judge. Petitioner urged that this claimed off the record objection satisfied the requirement of Rule 51, or made petitioner's position sufficiently clear as to give meaning to the otherwise unintelligible on the record statement.

Counsel for respondent have lodged with the Court an affidavit of respondent's trial counsel describing the instruction conference with Judge West.

According to that affidavit no objection was ever made at that conference to the "single violation" instruction or to any other instruction subsequently presented to the jury. The affidavit states that, on the contrary, petitioner's lead counsel, Richard Mahoney, expressly agreed to the court's proposed instructions at that conference.

The representation made in this Court on behalf of petitioner was offered by Burck Bailey. Mr. Bailey, however, was not at the instruction conference, and he did not indicate on whom he had relied in reporting to the Court that an off the record objection had been made. Mr. Bailey's apparent error, and the exceedingly obscure nature of the statement that appears on page 693 of the transcript, may both have occurred because a third attorney for respondent, Dan Brummitt, the

attorney who made that statement, may not have been present at the instruction conference itself.

This Court should decline petitioner's invitation to engage in speculation regarding how the trial judge might have understood Mr. Brummitt's admittedly confusing if not incomprehensible statement. Rule 51 requires a party to state "distinctly the matter to which he objects and the grounds of his objection" in order to avoid the need for such appellate exegesis or cryptography. (Emphasis added). The tenth circuit court of appeals has expressly admonished attorneys in that circuit that they cannot rely either on remarks in chambers conferences[1] or on arguments made at some prior stage

[1] Great-West Life Assurance Co. v. Levy, 382 F.2d 357, 359 (10th Cir. 1967).

of the proceedings,[2] but must comply with Rule 51 by making a specific and clear objection on the record to any disputed instructions.

The importance of such specificity and clarity is demonstrated by the ambiguity which still characterizes petitioner's position. It is unclear whether petitioner is contending in this Court (1) that a plaintiff must prove both the existence of a policy and the existence of a series of violations, (2) that proof of a series of violations is the only way to establish the existence of a policy, (3) that the particular violation proven here would, without other proof, be insufficient to establish the existence of a relevant muncipal policy, (4) that the plaintiffs here failed to offer any credible evidence of a policy, except for

[2] American Motors Sales Corporation v. Semke, 384 F.2d 192, 198 (10th Cir. 1967).

the proof of a single violation, or (5) that no single constitutional violation, regardless of the circumstances or the position of the perpetrator, could ever support an inference of the existence of a city policy. Only if the statement on page 693 had the latter meaning might it be sufficient to preserve an objection to the single incident instruction. But there is simply no way of knowing on the present record whether that is the argument intended by Brummitt or whether that is what the trial court understood Brummitt to mean.

The Court also inquired at oral argument whether a finding of muncipal liability based on adequate training and supervision was precluded by Rizzo v. Goode 423 U.S. 362 (1976). Whatever the merits of this issue, it is not one preserved or even raised by petitioner's below. The trial judge expressly

instructed the jury that liability could be based on a policy of failing to provide adequate training or supervision,[3] and petitioner did not voice even an unintelligible objection to that instruction. On the contrary, petitioner expressly acknowledged in its pre-trial brief that the municipal liability could be grounded on a city's training and supervision policies.[4] Neither in the court of appeals nor in this Court has petitioner disavowed that position.

The unobjected to instruction was clearly correct. Monell imposes liability on a city for a constitutional violation

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3 J.A. 43-44.

4 Trial Brief of Defendant, p. 3:

> "[A] showing of reckless or non-existent training must be affirmatively shown. The affirmative showing of grossly negligent or reckless training must then be shown to be the causal link of plaintiff's damages."

caused by "a government's policy", 436 U.S. at 694, not "a government's policy other than a training policy."[5] The issues raised by Rizzo are significantly different than those which arise under Monell. In Rizzo the plaintiff sued only individual muncipal officials, not the city of Philadelphia itself; the standard for municipal and individual liability under section 1983 are clearly different. Compare Owen v. City of Independence,

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5 Monell read Rizzo to have held "that the mere right to control without any control or direction having been exercised and without any failure to supervise is not enough to support §1983 liability." 436 U.S. at 694 n.58. That holding is clearly inapplicable to a case such as this in which the plaintiff claimed both that there was "a failure to supervise" and that the city did indeed exercise "control or direction" over the training program. In Owen v. City of Independence this Court noted with approval that one of the effects of potential municipal liability under Monell would be "to increase the attentiveness with which officials at the higher levels of government supervise the conduct of their subordinates." 445 U.S. 622, 652 n.36 (1980) (Emphasis added).

supra with Scheuer v. Rhodes, 416 U.S. 232 (1974). The plaintiffs in Rizzo sought sweeping injunctive relief which would have required the federal courts to "supervise the functioning of the police department," 423 U.S. at 380, a proposed remedy which this Court concluded disregarded important principles of federalism. Id. at 378-80. Rizzo itself emphasized that the standards which a plaintiff must meet to obtain injunctive relief under section 1983 were different and more stringent than those applicable to an action for damages. Id. at 378; see also City of Los Angeles v. Lyons, 461 U.S. 95 (1983). The prospect of substantial damage awards may well provide the spur or catalyst which leads a city to reevaluate policies that cause constitutional violations, cf. Albemarle Paper Co. v. Moody, 422 U.S. 405, 417-18 (1975), but such awards, unlike the injunction sought

in Rizzo, do not directly restrict the city's "latitude in the dispatch of its own internal affairs." Rizzo v. Goode, 423 U.S. at 379.

CONCLUSION

For the above reasons the decision of the tenth circuit should be affirmed. In light of the question which has now arisen as to whether the disputed instruction was objected to at the off the record conference, it may be appropriate to remand this case for a resolution of that factual issue.

Respectfully submitted,

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